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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 336

DELONG CORPORATION, a Delaware corporation,
Petitioner,

v.

THE OREGON STATE HIGHWAY COMMISSION, composed of Glenn L. Jackson, Kenneth N. Fridley and David B. Simpson, in their capacity as Oregon State Highway Commissioners, and individually, Forrest Cooper and Ivan D. Merchant,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on the 12th day of April 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court printed in Appendix B hereto, *infra* pp. 13a *et seq.* is reported in 233 Fed. Supp. 7. The opinion of the Court of Appeals printed in Appendix B hereto, *infra* pp. 9a-12a is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on the 12th day of April 1965. (See Appendix B, p. 12a *infra.*) Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a State Highway Commission, by engaging in the building of a bridge between two states over navigable waters of the United States and with Federal aid, has subjected itself to Federal regulation and waived immunity from suit within the purview of *Parden* v. *Terminal Ry.* 377 U.S. 184, 84 S. Ct. 1207 (1964).

2. Whether the State Highway Commission of Oregon in its dealings with out-of-state contractors in connection with the erection of an interstate bridge on behalf of itself and the Washington State Highway Commission is subject to suit in Federal District Court as a "citizen" of Oregon within the purview of 28 U.S.C. 1332.

STATUTES INVOLVED

The statutory provisions involved are Sections 1331 and 1332 of Title 28 U.S.C., Art. I, Sec. 10, Clause 3, of the Constitution of the United States and Amendment Eleven of the Constitution of the United States. They are printed in Appendix A, *infra,* p. 1a.

STATEMENT OF THE CASE

Petitioner DeLong Corporation, a Delaware corporation, on February 18, 1964, filed its complaint for declaratory judgment and injunctive relief in the United States District Court for the District of Oregon against the Oregon State Highway Commission, naming the Commissioners defendants in their official, as well as in their individual, capacities. The complaint also named as individual defendants (not in their official capacity) the Oregon Highway Engineer and the Oregon Bridge Engineer, respondents Cooper and Merchant, respectively.

Respondents successfully moved to dismiss the complaint as amended, under Rule 12(b) FRCP on the grounds that the Court lacked jurisdiction over the subject matter and over the persons of the respondents; that the amended complaint failed to state a claim on which relief could be granted, and for failure to join indispensable parties.

The suit arose from a controversy in connection with a contract between petitioner and respondent Oregon State Highway Commission for the construction of foundations for an interstate bridge over the Columbia River. The bridge is being erected between Astoria (State of Oregon) and Point Ellice (State of Washington), as part of the interstate road network connecting Seattle and Los Angeles.

Petitioner alleged that the invitation for bids contained false and misleading representations, and further claimed breach of contract by respondents. Petitioner also alleged that the individual respondents, in their individual capacity, had acted outside their statutory authority and committed torts against appellant, giving rise to a claim for damages.

Petitioner based jurisdiction of the District Court to adjudicate the contractual controversy and its tort claims on 28 U.S.C. 1332, alleging complete diversity of citizenship between petitioner, as a citizen of the State of Delaware, and respondent Commission as well as the individual respondents, as citizens of the State of Oregon. It is conceded that the amount in controversy exceeds $10,000.

Petitioner also claimed jurisdiction of the District Court under 28 U.S.C. 1331, in view of the fact that the basic agreement between the State of Oregon and the State of Washington providing for the development, construction, maintenance and operation of the bridge, constituted a compact within the purview of Article I, Section 10, Clause 3 of the Constitution of the United States requiring the consent of Congress. Such consent of Congress to the compact was not obtained by the two States and petitioner asked the District Court for a judgment declaring that further performance of the contract for the erection of the bridge would be unlawful (there being no lawful Federal authority for its construction) and that its contract was invalid.

Jurisdiction under 28 U.S.C. 1331 was alternatively invoked on the basis of the fact that under the General Bridge Act of 1964, 33 U.S.C. 525 respondents were required to submit to and obtain approval of plans and specifications for any bridge over navigable waters of the United States from the Secretary of the Army, that the plans and specifications submitted to the Secretary were faulty and misleading, and that the approval of the Secretary of the Army was void *ab initio*, making further performance by petitioner unlawful.

Finally, jurisdiction under 28 U.S.C. 1331 was alternatively invoked by petitioner on the basis that because of the bridge project being a Federal Aid primary project, a multitude of Federal law and regulations applied to the contract either by specific incorporation into the contract or by operation of law, raising a number of Federal questions in the adjudication of the controversy between petitioner and respondent.

Respondents argued that the action was one against the State of Oregon rather than against the named defendants, thus depriving the Court of Sec. 1332 jurisdiction (because the State is not a "citizen"), and that there was no Sec. 1331 jurisdiction because of failure to raise a Federal question.

Respondents further argued that even if Federal questions had in fact been raised, the Commission or the State could not be made a defendant by reason of their immunity under the Eleventh Amendment of the Constitution of the United States. Petitioners urged that such immunity, if applicable, was waived by the Commission's (and the State's) "leaving the sphere that is exclusively [their] own and enter [ing] into activities subject to Congressional regulation . . ." within the purview of *Parden* v. *Terminal Ry., supra.*

The District Court ruled in favor of respondents on the issue of lack of jurisdiction under 28 U.S.C. 1332, finding that the suit was an action against the State of Oregon. The Court did not decide whether there were Federal questions involved which would confer jurisdiction under 28 U.S.C. 1331. However, it held that under the Eleventh Amendment respondents, as an agency of the State of Oregon, were immune from suit in Federal Court; that Oregon had not consented to be sued in Federal Court, nor had Oregon waived its im-

munity under the Eleventh Amendment. The United States Court of Appeals for the Ninth Circuit affirmed on the opinion of the District Court.

Petitioner respectfully submits that both Courts not only erred in holding that the action below was an action against the State of Oregon, but also are in direct conflict with the holding of this Court in the *Parden* case by ruling that respondents were entitled to the protection of the Eleventh Amendment although they entered the sphere of Federal regulation and jurisdiction by building an interstate bridge over a navigable river of the United States on behalf of the Washington and Oregon Highway Commissions.

REASONS FOR GRANTING THE WRIT

1. Conflict of the Decision Below with This Court's Decisions in Parden v. Terminal Ry. and Petty v. Tennessee-Missouri Bridge Commission.

This Court held in *Parden* v. *Terminal Ry., supra,* that the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce, and that "[by] empowering Congress to regulate commerce, . . . the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." 377 U.S. at pp. 191 and 192; 84 S. Ct., at p. 112. This Court held further that by entering into activities subject to Congressional regulation the state subjects itself to that regulation as fully as if it were a private person or corporation and is deemed to have waived its immunity under the Eleventh Amendment of the Constitution of the United States.

In the case at bar, respondents, on behalf of the State Highway Commissions of the State of Washing-

ton and of the State of Oregon undertook to build a four mile long bridge over the mouth of the Columbia River. This undertaking materially affects the navigable waters of the United States; the bridge will constitute a vital link in interstate commerce. Tolls from interstate commerce will repay bonds financing the construction. The project is the subject of Federal aid and will be built partially with Federal funds. It was the subject of a compact between the two States prior to its inception, although the compact was not submitted to Congress for approval as required by Art. I, § 10, Cl. 3 of the Constitution.

Governed by the provisions of the Compact clause (Const., Art. I, § 10, Cl. 3) and those of the Commerce clause of the constitution, and subject to Congressional regulation under Titles 33 and 23 of the United States Code, respondents' activity certainly is within the sphere of Federal Regulation encompassed in *Parden*. Such entry into the sphere of Federal regulation was substantial rather than incidental and constitutes an activity deemed to be a waiver of immunity under the Eleventh Amendment, under the *Parden* doctrine.

The decision below, therefore, is in direct conflict with this Court's holding in *Parden*. Because the District Court, affirmed by the Court of Appeals, interprets the decision in *Parden* as resting on the fact that the suit was brought "upon a cause of action expressly created by Congress", 233 F. Supp. 19, footnote 30, citing 377 U.S. at 187; 84 S. Ct. at 1210, the decision below, unless reversed by this Court, will cause an erosion of the doctrine laid down by this Court in *Parden*.

Similarly, the decision below conflicts with this Court's earlier decision of *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 276; 79 S. Ct. 785 (1959).

The State of Oregon entered into a compact with the State of Washington for the construction of the interstate bridge giving rise to this litigation (233 F. Supp. at p. 17).

The District Court held (we submit, in error) that Congress had consented to the compact in advance by the enactment of the General Bridge Act of 1946, 33 U.S.C. 525, almost twenty years prior to the signing of the compact. Because this implied general consent does not contain the express jurisdictional reservation of Congress mentioned by the Supreme Court in *Petty* v. *Tennessee-Missouri Bridge Commission, supra,*[1] the lower Courts hold that the authority of *Petty* is not applicable to the case at bar.

It is submitted that the point of decision in the *Petty* case is not the inclusion by Congress of the specific words, "jurisdiction . . . of any Court" in its consent to the *Petty* compact. The point of decision both in *Petty* and in *Parden* is the broader Congressional policy that, "reserves the jurisdiction of the Federal Courts to act in any matter arising under the compact over which they would have jurisdiction by virtue of the fact that the Mississippi is *a navigable stream and that interstate commerce is involved.*" 350 U.S. at p. 281. (Emphasis supplied.) The decision below, therefore, is in direct conflict with this holding and unless reversed will provide precedent in the Appellate Courts for departure from this Court's holding in *Parden* and *Petty.*

---

[1] "[N]othing herein contained shall be construed to affect, impair, or diminish any right, power, or jurisdiction of * * * any court * * * of the United States * * *." 359 U.S. at 281, 79 S. Ct. at 789.

2. Conflict of the decision with Markham v. City of Newport News (C.A. 4, 1961)

Markham v. *City of Newport News*, 292 F. 2d 711, (C.A. 4, 1961) holds that an express waiver of sovereign immunity by a State cannot be restricted to its own courts, but such waiver extends to the Federal Courts where the state provides a substantive right. The decision below is in direct conflict.

As amended in 1959, the revised Statutes of Oregon provide expressly for "actions and suits by and against governmental units and officials" in O.R.S. 30.310, *seq.* The correlative provisions of O.R.S. 30.310 (Actions and Suits by Governmental Units) and of O.R.S. 30.320 (Actions and Suits Against Governmental Units) when read together clearly indicate the intent of the State of Oregon to sue and to be sued in connection with its contractual obligations. O.R.S. 30.310, reprinted in its entirety at App. A, p. 4a *infra*, provides for actions and suits by Governmental units.

O.R.S. 30.320, reprinted in its entirety at App. A, p. 4a *infra*, provides in part:

> "Actions and Suits against Governmental Units. A suit or action may be maintained against any county and against the State of Oregon by and through and in the name of the appropriate state agency upon a contract made by the county in its corporate character, or made by such agency and within the scope of its authority, and not otherwise, ..."

There is nothing in the statutes and nothing in the decisions of the Supreme Court of the State of Oregon or any Federal Court to support the holding of the District Court that "this statute waives only the common law immunity of the sovereign to be sued in its own

courts." 233 F. Supp. at p. 19. The decision therefore, as affirmed is in direct conflict with *Markham* v. *City of Newport News, supra.*

3. Respondent State Highway Commission, Entering the "Federal Sphere" Is a Citizen Within the Purview of 28 U.S.C. 1332.

(Conflict with *Louisiana Highway Commission* v. *Farnsworth,* 74 F. 2d 910 (5 Cir., 1935) and the need for clarification of *State Highway Commission of Wyoming* v. *Utah Construction Co.,* 278 U.S. 194)

In paragraphs III and IV of its amended complaint petitioner asserted jurisdiction of the District Court under 28 U.S.C. Sec. 1332, alleging diversity of citizenship as a citizen of Delaware, while respondent Oregon State Highway Commission was alleged to be a citizen of Oregon and, in any event, for the purposes of the erection of the bridge, had been constituted a quasi-public corporation, a separate entity, and thus a citizen of Oregon.

By the amendment of O.R.S. 30.320 (see App. A, p. 4a, *infra*) in 1959, respondent Commission was blanketed in with counties and other entities quasi-corporate in character, which like the Highway Commission had grown into independent bodies with manifold contractual activities. All of them were authorized to sue under O.R.S. 30.310 and authorized to be sued under O.R.S. 30.320.

Commissions, municipal corporations and counties have been held to be "citizens" within the diversity of citizenship concept by this Court in *Milwaukee County* v. *M. E. White Co.,* 296 U.S. 268, 56 S. Ct. 229, 80 L. Ed. 220 (1935), by the Court of Appeals for the Fifth Circuit in *Pearl River County, Miss.* v. *Wyatt Lumber*

Co., 270 F. 26 (1921), by the Court of Appeals for the Eighth Circuit in *City of Memphis, Tenn.* v. *Ingram*, 195 F. 2d 338 (1952), and in *Pettibone* v. *Crook County, Minn.*, 120 F. 2d 850 (1941).

A commission created by statutory enactment almost identical with the Oregon statute was held to be a citizen in *Louisiana Highway Commission* v. *Farnsworth*, *supra*, and the holding below is in direct conflict with that of the Fifth Circuit in the *Farnsworth* case.

More important, however, in the instant case, respondent Highway Commission undoubtedly is not acting as an arm or alter ego of the State of Oregon. It is acting as an independent entity and agent in behalf of the Washington State Highway Commission and in behalf of itself in constructing a bridge over navigable waters to be used in interstate commerce. The funds for the bridge are raised by bonds to be repaid from tolls and franchise fees collected from interstate commerce (O.R.S. 367.370, 367.415, App. A, pp. 5a and 6a, *infra*). Thus, the judgment below would not expend itself against the State Treasury.

The Courts below and the cases in conflict with *Farnsworth* rely extensively on the decision of this Court in *State Highway Commission of Wyoming* v. *Utah Construction Co.*, 278 U.S. 194, 49 S. Ct. 104, 73 L. Ed. 262. We submit that in cases, as in the instant case, where a highway commission enters the field of Federal regulation, enters the market place in interstate commerce, this Court should rule *Utah Construction Co.* inapplicable. To this extent, a clarification, limitation, or revision of the tenets of *Utah Construction Co.* is urgently solicited as being "in accord with the common sense of this Nation's federalism". *Parden* v. *Terminal Ry.*, *supra.*, 377 U.S. at p. 196, 84 S. Ct. at p. 1215.

It is urged not only by private litigants but by distinguished authorities, as for instance, Professor James Wm. Moore:

> "It is true that many states have now modernized their procedures along federal lines, and that the independence, integrity and ability of most state judges is generally accepted. Nevertheless, some states have not come as far as others, and it is only in the federal courts that an out-of-state litigant is always afforded the best available pretrial and trial procedures, qualified judges with secure tenure and compensation who retain their common-law powers to comment on the evidence and control the course of trial, and a qualified jury to determine by a unanimous verdict those questions which were historically within its province.
>
> While local prejudices and state jealousies may be diminishing, it is a fair inference that some litigants still resort to the federal courts because of apprehensions as to the kind of justice which they will receive in the courts of the state of which their adversary is a citizen. Citizens of different states are also citizens of the United States, and they ought to be able to litigate their controversies in a tribunal of the sovereign to which they both belong. ***This need is especially apparent when the parties are engaged in interstate transactions*** and when problems of conflicts of law are involved." (emphasis supplied).
>
> —1 Moore's Federal Practice, 701.31, 701.32.

CONCLUSION

For the foregoing reasons it is prayed that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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July 9, 1965

APPENDIX

APPENDIX A

Statutory Provisions Cited and Quoted

Constitution of the United States, Article I, § 10, Cl. 3

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Constitution of the United States, Amendment Eleven

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

23 U.S.C. § 315. Rules, regulations, and recommendations

Except as provided in sections 204(d), 205(a), 206(b), 207(b), and 208(c) of this title, the Secretary is authorized to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this title. The Secretary may make such recommendations to the Congress and State highway departments as he deems necessary for preserving and protecting the highways and insuring the safety of traffic thereon.

28 U.S.C. § 1331. Federal question; amount in controversy; costs

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and arises under the Constitution, laws or treaties of the United States.

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

33 U.S.C. § 401. Construction of bridges, causeways, dams or dikes generally

It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army.

33 U.S.C. § 491. Approval of and deviation from plans

When, after March 23, 1906, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of the Army and Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such bridge and accessory works; and when the plans for any bridge to be constructed under the provisions of sections 491-498 of this title, have been approved by the Chief of Engineers and by the Secretary of the Army it shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army.

33 U.S.C. § 525. Construction and operation of bridges; consent of Congress; approval of plans; private highway toll bridges

(a) The consent of Congress is granted for the construction, maintenance, and operation of bridges and approaches thereto over the navigable waters of the United States, in accordance with the provisions of sections 525-533 of this title.

(b) The location and plans for such bridges shall be approved by the Chief of Engineers and the Secretary of the Army before construction is commenced, and, in approving the location and plans of any bridge, they may impose any specific conditions relating to the maintenance and operation of the structure which they may deem necessary in the interest of public navigation, and the conditions so imposed shall have the force of law.

Oregon Revised Statutes

Action and Suits by and Against Governmental Units and Officials

30.310 Actions and suits by governmental units. A suit or action may be maintained by the State of Oregon or any county, incorporated city, school district or other public corporation of like character in this state, in its corporate name, upon a cause of suit or action accruing to it in its corporate character, and not otherwise, in the following cases:

(1) Upon a contract made with the public corporation.

(2) Upon a liability prescribed by law in favor of the public corporation.

(3) To recover a penalty or forfeiture given to the public corporation.

(4) To recover damages for injury to the corporate rights or property of the public corporation.

30.320 Actions and suits against governmental units. A suit or action may be maintained against any county and against the State of Oregon by and through and in the name of the appropriate state agency upon a contract made by the county in its corporate character, or made by such agency and within the scope of its authority, and not otherwise; provided, however, that no suit or action may be maintained against any county or the State of Oregon upon a contract relating to the care and maintenance of an inmate or patient of any county or state institution. An action or suit may be maintained against any other public corporation mentioned in ORS 30.310 in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such other public corporation. [Amended by 1959 c.614 § 1]

30.330 Contracts of State Highway Commission providing for arbitration. The provisions of ORS 30.310 and

30.320 shall not apply to contracts made by the State Highway Commission that provide for arbitration under the provisions of ORS 33.210 to 33.340.

366.155 Duties and powers of highway engineer. (1) The State Highway Engineer, among other things shall:

(f) Prepare surveys, plans, specifications and estimates for the construction, reconstruction, improvement, maintenance and repair of any bridge, street, road and highway under the direction of the commission. In advertising for bids on any such project the commission shall invite bids in conformity with such plans and specifications.

367.370 Authority to sell limited amounts of bonds under ORS 367.370 to 367.420. (1) In adidtion to the authority now vested by law in the commission to issue and sell state highway bonds of the State of Oregon, and notwithstanding the limitations contained in other laws, the commission, subject to subsection (2) of this section, shall issue and sell state highway bonds of the State of Oregon to provide funds to defray the costs, incurred after March 1, 1961, of location and construction of a bridge over the Columbia River, but excluding costs of location, relocation, improvement, construction or reconstruction of approaches as shown and described in "A Report On A Proposed Bridge Across The Columbia River," prepared by the Oregon and Washington State Highway Commissions, dated January 1959. For such purposes the commission shall issue bonds in the aggregate principal sum of not to exceed $24 million par value.

(2) The commission shall not issue bonds under subsection (1) of this section unless and until the State of Washington, by law, has imposed, to the extent provided in subsection (3) of this section, a first and prior charge against all revenues subsequently derived from the proceeds of state excise taxes on motor vehicle fuels directed by law to be deposited in the Washington motor vehicle fund available for Washington State Highway Commission purposes,

and an agreement or agreements have been entered into between the Oregon State Highway Commission and the Washington State Highway Commission whereby, among other things, the State of Washington is bound to pay from any moneys in the Washington motor vehicle fund not otherwise pledged or from any other source available to the Washington State Highway Commission for such purpose the amounts as provided in subsection (3) of this section.

(3) To the extent that revenues derived from the imposition and collection of tolls and franchise fees for the use of the bridge referred to in subsection (1) of this section in any year are insufficient to provide for the payment of principal, interest and other charges incidental to the issuance, sale and retirement of the bonds referred to in subsection (1) of this section and refunding bonds issued under ORS 367.400 for the purpose of refunding outstanding bonds issued under subsection (1) of this section or such refunding bonds, the State of Oregon shall pay the first $100,000 of such deficit for such year, and the State of Washington shall pay, when due, 40 percent of the balance of such deficit for such year; except that in no case shall the portion of such deficit paid by the State of Washington exceed $200,000 on any such year. [Formerly 366.7021]

367.415 Use of revenues from bridge financed with receipts from bonds under ORS 367.365 to 367.420. In addition to other provisions of ORS 367.365 to 367.420 relating to the payment of the principal, interest and other charges incidental to the issuance, sale and retirement of bonds issued under subsection (1) of ORS 366.370 and refunding bonds issued under ORS 367.400 for the purpose of refunding outstanding bonds issued under subsection (1) of ORS 367.370 or such refunding bonds, and notwithstanding any other provision of law, all revenues derived from the imposition and collection of tolls and franchise fees for the use of the bridge referred to in subsection (1) of ORS

367.370 shall be used for the following purposes in the following order:

(1) Payment of all costs of toll collection and insurance in the event the bridge is insured; and then

(2) Payment of the principal, interest and other charges incidental to the issuance, sale and retirement of the bonds issued under subsection (1) of ORS 367.370 and refunding bonds issued under ORS 367.400 for the purpose of refunding outstanding bonds issued under subsection (1) of ORS 367.370 or such refunding bonds. [Formerly 366.7029]

23 U.S.C. § 129 Toll roads, bridges, tunnels, and ferries

(a) Notwithstanding the provisions of section 301 of this title, the Secretary may permit Federal participation, on the same basis and in the same manner as in the construction of free highways under this chapter, in the construction of any toll bridge, toll tunnel, or approach thereto, upon compliance with the conditions contained in this section. Such bridge, tunnel, or approach thereto, must be publicly owned and operated. Federal funds may participate in the approaches to a toll bridge or toll tunnel whether such bridge or tunnel is to be or has been constructed, or acquired, by the State or other public authority. The State highway department or departments must be a party or parties to an agreement with the Secretary whereby it or they undertake performance of the following obligations:

(1) all tolls received from the operation of the bridge or tunnel, less the actual cost of such operation and maintenance, shall be applied to the repayment to the State or other public authority of all of the costs of construction or acquisition by such bridge or tunnel, except that part which was contributed by the United States;

(2) no tolls shall be charged for the use of such bridge or tunnel after the State or other public authority shall have been so repaid; and

(3) after the date of final repayment, the bridge or tunnel shall be maintained and operated as a free bridge or free tunnel.

APPENDIX B

Copies of Opinions and Judgments Below

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19549

DELONG CORPORATION, a Delaware Corporation, *Appellant*,

v.

THE OREGON STATE HIGHWAY COMMISSION, ET AL., *Appellees*.

Appeal from the United States District Court
for the District of Oregon

PROCEEDINGS HAD IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Wednesday, April 7, 1965

Before: HAMLEY, MERRILL & KOELSCH, Circuit Judges

ORDER OF SUBMISSION

This cause coming on for hearing, Mr. Bert Rand, argued for the appellant, and Mr. Alan H. Johnson, Assistant Attorney General for the State of Oregon, argued for the appellee, thereupon the Court ORDERED the cause submitted for consideration and decision.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Monday, April 12, 1965

Before: HAMLEY, MERRILL & KOELSCH, Circuit Judges

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk and that a judgment to be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19549

DELONG CORPORATION, a Delaware Corporation, *Appellant*,

v.

THE OREGON STATE HIGHWAY COMMISSION, composed of Glenn L. Jackson, Kenneth N. Fridley and David B. Simpson, in their capacity as Oregon State Highway Commissioners and Individually, FORREST COOPER and IVAN D. MERCHANT, *Appellees*.

[April 12, 1965]

Appeal from the United States District Court for the District of Oregon

Before: HAMLEY, MERRILL and KOELSCH, Circuit Judges

HAMLEY, Circuit Judge:

DeLong Corporation brought this action in the district court against The Oregon State Highway Commission and the individual members of the commission. Forrest Cooper and Ivan D. Merchant, state highway engineer appointed by the commission, and bridge engineer assistant to Cooper, respectively, were also named defendants. Asserting that the district court had jurisdiction under 28 U.S.C. § 1331 (1958) (federal question), and 28 U.S.C. § 1332 (1958) (diversity of citizenship, the company sought a declaratory judgment, injunctive relief and recovery of damages after proceedings before a master. On motion of the defend-

ants, the district court dismissed the action for lack of jurisdiction under either statute. *DeLong Corporation* v. *The Oregon State Highway Commission,* 233 F.Supp. 7, This appeal followed.

The action arises from a controversy in connection with a contract between the company and the State of Oregon, made in the name of the state by and through the commission, for the construction of an interstate bridge over the Columbia River. The bridge is being erected between Astoria, Oregon and Point Ellice, Washington, connecting highways in the two states. Under the contract, the company, which was incorporated in the State of Delaware and has its principal place of business in the State of New York, undertook to erect the foundations for the bridge.

The company alleged that the invitation for bids, issued by the commission on behalf of itself and the Washington State Highway Commission, contained false and misleading representations constituting a breach of contract. The company also alleged that the individual defendants, in their individual capacities, had acted outside their statutory authority and had committed torts against the company, giving rise to a claim for damages. Invoking 28 U.S.C. § 2201 (1958), the company asked for a judicial declaration of its rights with regard to all issues. It also asked for an injunction which would permit continuing performance pending adjudication of its rights. Finally, the company asked that after its rights had been determined, a master be appointed to hear evidence and make a report to the court on the amount of damages to which the company is entitled.

Jurisdiction under the diversity statute, 28 U.S.C. § 1332, was claimed on the theory that the company is a citizen of the States of Delaware and New York, that defendants are citizens of the State of Oregon, and that the amount involved is in excess of the statutory minimum of ten thousand dollars. In its motion to dismiss, defendants challenged the assertion that the commission is a citizen of the State of Oregon. They asserted that the action is ac-

tually one against the State of Oregon, and that a state is not a "citizen" within the meaning of 28 U.S.C. § 1332.

The district court held with the defendants on this issue. The court ruled: (1) the real party in interest, rather than the names of particular parties, is the important factor in determining whether there is diversity jurisdiction; (2) the State of Oregon is the real party in interest in this litigation because (a) the commission is not an entity separate and apart from the state, but is an arm of the state performing an essential governmental function, and (b) the legislation authorizing the construction of the bridge in question was not intended to create an autonomous, separate entity or corporation in the nature of an interstate bridge authority; and (3) the State of Oregon is not a "citizen" within the meaning of 28 U.S.C. § 1332.

Jurisdiction under the federal question statute, 28 U.S.C. § 1331, was asserted on the theory that important questions of constitutional and federal statutory law controlling the company's rights and duties under its contract to construct the bridge foundations were involved in the suit. Three such questions were said to be involved: (1) whether the arrangement between the States of Oregon and Washington covering the planning, construction, financing and operation of the bridge constituted a compact requiring the consent of Congress under Article I, section 10, clause 3 of the Constitution, no such consent having been obtained; (2) whether approval of the Secretary of the Army was obtained on the basis of faulty plans and specifications, in violation of the General Bridge Act of 1946, 60 Stat. 847, as amended, 33 U.S.C. § 525 (1958), making such approval void *ab initio;* and (3) whether approval of the bridge, being a part of a federal aid project approved by the Bureau of Public Roads, was obtained on the basis of faulty plans and specifications, and was therefore invalid.

The district court did not decide whether these were federal questions of a kind which would confer jurisdiction

on the district court. Instead, it held that under the Eleventh Amendment of the United States Constitution, the State of Oregon is immune from suit in federal court without its consent, and that Oregon has not consented to be sued in federal court or otherwise waived its immunity under the Eleventh Amendment.

On this appeal the company challenges each of the district court rulings referred to above.

We are in complete agreement with the views of the district court as expressed in its perceptive and thoroughly documented opinion reported at 233 F.Supp. 7. No useful purpose would be served by restating those views in this opinion.

The judgment is affirmed.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

No. 19,549

DELONG CORPORATION, a Delaware Corp., *Appellant*,

v.

THE OREGON STATE HIGHWAY COMMISSION, etc., et al., *Appellees*

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 12, 1965

DELONG CORPORATION, a Delaware corporation, *Plaintiff*,

v.

THE OREGON STATE HIGHWAY COMMISSION, composed of Glenn L. Jackson, Kenneth N. Fridley and David B. Simpson, in their capacity as Oregon State Highway Commissioners and Individually, Forrest Cooper and Ivan D. Merchant, *Defendants*.

Civ. No. 64-79.

United States District Court
D. Oregon.

Aug. 24, 1964.

KILKENNY, District Judge.

Under its amended complaint, the plaintiff seeks a declaration[1] of rights in connection with the provisions of a certain contract between plaintiff and the state of Oregon, acting by and through its State Highway Commission. The contract covers the construction of a massive bridge over the Columbia River between Astoria, Oregon, and Megler, Washington, which is being built through the joint efforts of the states of Oregon and Washington. Before the court is defendants' motion to dismiss on the following premises: (1) the court lacks jurisdiction over the subject matter; (2) the court lacks jurisdiction over the persons of defendants; (3) the amended complaint fails to state a claim upon which relief can be granted; and (4) failure to join indispensable parties.

Defendant Cooper is the State Engineer employed by the Highway Commission and defendant Merchant is the assistant to Cooper.

Ripe for discussion and decision at this stage are the jurisdictional questions arising under points (1), (2) and (4).

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[1] 28 U.S.C. § 2201.

Simply stated, defendants contend that they are clothed with the immunity of the state of Oregon, and that the Eleventh Amendment to the United States Consitution does not permit the prosecution of this action.

Plaintiff counters with the claims: (1) that the court has jurisdiction under the diversity statute[2] on the theory that plaintiff is a citizen of the state of Delaware, with its principal place of business in New York; that defendants are citizens of the state of Oregon, and that the amount involved is in excess of the statutory minimum; (2) that the court has jurisdiction by reason of 28 U.S.C. § 1331 in that the agreement between Oregon and Washington authorizing construction of the bridge constitutes a compact within the meaning of Article I, Sec. 10, Clause 3 of the United States Constitution, and that no Congressional consent, as required by said clause, was obtained by the states of Oregon and Washington; (3) that jurisdiction under the provisions of said section 1331 is present by reason of the requirements of the General Bridge Act of 1946,[3] under which the highway departments of the states of Oregon and Wahington and the Washington Toll Bridge Authority obtained approval for the construction of said bridge from the Secretary of the Army and its chief engineer, the plaintiff asserting that the plans and specifications mentioned in the contract were incorrect and faulty, and that by reason thereof the approval of the Secretary of the Army and/or the Chief of Engineers was invalidly obtained and was, therefore, void; (4) that jurisdiction is present by reason of defendants obtaining a contribution from the United States towards the expense of the construction of the bridge in pursuance of Title 23 U.S.C.; that said payments had to be approved by the Bureau of Public Roads and that the Bureau of Public Roads will not approve further payments to plaintiff if it is established that the agreement was ob-

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[2] 28 U.S.C. § 1332.

[3] 33 U.S.C. § 525 et seq.

tained on the basis of incorrect plans and specifications; and (5) to the extent that defendants might represent the state of Oregon and act on behalf of the state, that the state of Oregon waived immunity from suit under the Eleventh Amendment and consented that the Highway Commission be sued in this court.

I. For decision under the first point is whether the Oregon State Highway Commission is a citizen of the state of Oregon. In considering this subject, we must keep in mind that diversity jurisdiction, in the last analysis, present a problem which is separate and distinct from the immunity of the state under the Eleventh Amendment. Jurisdiction exists under the diversity statute when the controversy arises between citizens of different states, not when it arises between a citizen of one state and another state. State Highway Commission of Wyoming v. Utah Construction Co., 278 U.S. 194, 49 S.Ct. 104, 73 L.Ed. 262 (1929). The real party in interest, rather than the names of particular parties, is the important factor in determining whether there is diversity jurisdiction. Thus, in the case at bar, if the state of Oregon is the real party in interest, there is an absence of diversity jurisdiction even though the state may not be named. California, ex rel. McColgan v. Bruce, 129 F.2d 421, 147 A.L.R. 782 (9th Cir., 1942), cert. den. 317 U.S. 678, 63 S.Ct. 157, 87 L.Ed. 544; Weyerhaeuser Co. v. State Roads Comm'n of Maryland, 187 F. Supp. 766 (D.C.Md., 1960); Ex parte Nebraska, 209 U.S. 436, 28 S.Ct. 581, 52 L.Ed. 876 (1908). Therefore, the point at issue is whether this litigation amounts to anything more than an action against the state of Oregon. If it does not, jurisdiction cannot be predicated on the ground of diversity. In arriving at a proper conclusion, the court must look to the real party in interest, rather than the parties named in the pleadings. Ex parte Nebraska, supra; Missouri v. Homesteaders Life Ass'n, 90 F.2d 543 (8th Cir., 1937), cert. den. 302 U.S. 717, 58 S.Ct. 37, 82 L.Ed. 553. In making this determination, the federal courts will be

influenced by state decisions, dealing with the character and status of state agencies, but ultimately the question is one which the federal courts must answer. State Highway Commission in Arkansas v. Kansas City Bridge Co., 81 F.2d 689, 691 (8th Cir., 1936); Louisiana Highway Commission v. Farnsworth, 74 F.2d 910 (5th Cir., 1935), cert. den. 294 U.S. 729, 55 S.Ct. 638, 79 L.Ed. 1259.

In order to arrive at an intelligent conclusion, the court must closely analyze, not only the legislation which created the Oregon State Highway Commission, but also legislation, subsequently enacted, touching on the powers and duties of said Commission.

Originally, the Highway Commission of the state of Oregon consisted of the Governor, the Secretary of State and the State Treasurer.[4] The chief executive officer of the Commission was the State Highway Engineer. There is little doubt but the Highway Commission, under the original Act, was a mere agent of the state, even though it had power to let contracts for the construction of roads and to exercise any and all powers in connection therewith. In 1917, under an Act which was known as the Oregon Highway Law,[5] the legislation was amended under which the Highway Commission was thereafter to consist of three members to be appointed by the Governor. In that legislation, the State Highway Commission and the State Highway Engineer and all of their employees were designated as the State Highway Department. In other words, the State Highway Commission was and still is, a branch of the State Highway Department of the state of Oregon.[6] Of interest, and probably

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[4] Oregon Laws 1913, Chapter 339.

[5] Oregon Laws 1917, Chapter 237.

[6] ORS 366.105.

"The State Highway Department shall consist of the State Highway Commission, the State Highway Engineer, the Assistant State Highway Engineer, the Chief Counsel, the Secretary and all their employes or assistants."

of significance, is the fact that the legislature in the 1917 legislation distinguished between the powers and duties of the Commission and the duties of the Highway Engineer.[7] Section 8 of that legislation required that all contracts executed for the improvement of state highways should be in the name of the State of Oregon and executed by the Commission. The power of condemnation was in the state, acting by and through the Commission, as was the right to acquire rights-of-way by donation, purchase or agreement.[8] At that time the funds of the Commission were obtained by a state levy on all property in the state equaling one-fourth mill for each dollar of taxable property within a specific county, the highway tax to be collected by the county and transmitted to the State Treasurer, the said money so collected to constitute and to be kept in a fund known as the State Highway Fund.[9] In the same year, the Oregon legislature authorized the State Highway Commission to sell general obligation bonds of the state of Oregon to raise revenue for the construction of hard surfaced highways and certain post and forest roads in the state and to use said funds in connection with the expenditure of federal funds to be provided for the same purpose.[10] By section 13 of that legislation, the Highway Commission was authorized to enter into contracts for the purpose of constructing the roads mentioned in the act. This particular legislation was referred to and adopted by the people of the state of Oregon at an election held on the 4th day of June, 1917. From time to time, over the course of the years, the legislation touching on the powers, duties and authorities of the Highway Commission was amended. However, to

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[7] Oregon Laws 1917, Chapter 237, Secs. 4, 5, 6, 7.

[8] Oregon Laws 1917, Chapter 237, Sec. 9.

[9] Oregon Laws 1917, Chapter 237, Sec. 12.

[10] Oregon Laws 1917, Chapter 423.

this date, the Highway Commission is but a part of the Highway Department of the state of Oregon. Although the delegated powers and imposed duties of the Department[11] are varied, complex and broad, it is crystal clear that the Oregon legislature never intended the Commission to be anything other than an integral part of the state government. Examples are the requirement that the Engineer, rather than the Commission, collect and compile information and statistics relative to the condition of highways and bridges, both on state and county highways, make studies to determine the best methods of road construction in the various counties and sections of the state, the establishment of a highway fund with the State Treasurer in the name of the Highway Engineer,[12] the control exercised over office hours of the Commission and the requirement that the principal office of the Commission should be in Salem[13] and the direction to the Commission to establish, under its jurisdiction and control, a department to be known as the State Parks and Recreation Division.[14] Although the superintendent of state parks is appointed by and holds office during the pleasure of the Commission, the Oregon legislature fixes the limit of the powers and duties imposed.[15] Not only is the Commission empowered to acquire real property by agreement, donation or the exercise of eminent domain, for the purpose of state highways and incidental functions,[16] but it is also granted the right and directed to acquire, by purchase, agreement, donation or condem-

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[11] ORS 366.155, 366.205.

[12] ORS 366.155, 366.165.

[13] ORS 366.170.

[14] ORS 366.180.

[15] ORS 366.182.

[16] ORS 366.340.

nation, property for the development of state scenic and historic places[17] and to make regulations and provisions for the use and administration of all such places, together with regulations in parks and recreational areas.[18] The legislature made provision for the establishment and operation of arboretum and botanical gardens under the State Parks Division of the Commission and to accept funds from any source for the establishment of such gardens, the funds so received to be immediately paid into the General Fund in the State Treasury and designated as the Arboretum Botanical Garden Account.[19] Of great importance, and, in my judgment, a deciding factor on whether the Commission is a mere agent of the state, or is a separate entity or citizen within the meaning of the diversity statute, is the language of the statute permittting the Commission to institute eminent domain proceedings.[20] This legislation requires that the suit or action in a condemnation proceeding must be prosecuted for the state *in the name of the state, by and through the Commission.* Likewise, of immense significance is the fact that the Oregon legislature required that all contracts executed by the Commission be made *in the name of the State, by and through the Commission.*[21] All claims approved by the Commission are required to be filed with the Secretary of State of the state of Oregon, who is under a statutory duty to audit the claims, and if found satisfactory, to pay them out of the State Highway Fund. State Highway funds are derived from many sources, including, but not limited to, bonds issued in the name of the State by the Highway Commission, revenue from

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[17] ORS 366.345.

[18] ORS 366.350.

[19] ORS 366.355.

[20] ORS 366.375.

[21] ORS 366.400.

motor vehicle licenses, gasoline taxes, federal highway funds, and gifts. All funds must be deposited with the State Treasurer, who is directed to keep a separate Highway Fund.[22] Each enactment authorizing the issuance of bonds, from its inception in 1917, has provided that such bonds are general obligations of the state of Oregon.

Plaintiff in advancing its argument that the Highway Commission is a citizen, separate and distinct from the state of Oregon, relies on a number of Turnpike cases, including, but not limited to, Hunkin-Conkey Construction Co. v. Pennsylvania Turnpike Commission, 34 F. Supp. 26 (M.D.Pa., 1940) where the Turnpike Commission was authorized to contract, acquire property and issue bonds in its own name, the revenue bonds being payable exclusively from the tolls to be collected from the turnpike, the bonds creating no obligations for payment on the part of the state of Pennsylvania. Furthermore, the legislation specifically authorized the turnpike to sue and be sued in its own name; Kansas Turnpike Authority v. Abramson, 275 F.2d 711 (10th Cir., 1960), where the legislation creating the Authority authorized it to issue revenue bonds payable solely from the revenues of the project, and specifically authorized the Authority to sue and be sued in its own name. It was not under the supervision of the state or any other agency thereof; Guaranty Trust Co. of New York v. West Virginia Turnpike Comm'n, 109 F.Supp. 286 (S.D.W.Va. 1952), where the Turnpike Commission had no power to incur liability on behalf of the state, was not authorized to use any funds of the state and entered into contracts in its own name; Harrison Construction Co. v. Ohio Turnpike Comm'n, 272 F.2d 337 (6th Cir., 1959), where the court emphasized the importance of the Ohio legis-

[22] ORS 366.510.

lation permitting the Turnpike to sue and be sued in its own name, to issue revenue bonds, to take, hold and dispose of real and personal property (all public lands acquired by condemnation or purchase, to be in the name of the state); to make and enter into all contracts and agreements necessary or incidental to its purposes, with the provision that the Commission should make adequate compensation to the state for the use of all state lands, and the authorization to issue revenue bonds, with the principal and interest on such bonds to be paid solely from the revenue received from the operation of the Turnpike; Louisiana Highway Comm'n v. Farnsworth, supra, where the legislation creating the highway commission provided that the commission might sue and be sued in its own name. Otherwise, the powers and duties of the highway commission in that case are quite similar to the powers and duties of the highway commission in the instant case. The decision of the Fifth Circuit turns on the opinion of the Louisiana Supreme Court in Saint v. Allen, 172 La. 350, 134 So. 246, which involved the right of the Louisiana Highway Commission to employ attorneys to represent it without securing the consent or approval of the Attorney General of the state. The Louisiana Supreme Court held that the highway commission was a legal entity separate and distinct from the state and that it could employ its own attorneys. Obviously, this was an inter-departmental squabble between the Attorney General and the Highway Commission and I personally doubt if the decision should carry the weight given to it by the Court of Appeals of the Fifth Circuit in the Farnsworth case. It is my judgment that if the Louisiana Supreme Court was faced with the factual background of this case, it would hold that its highway commission, although an agent of the state, was clothed with the immunity of the Eleventh Amendment and that the commission was not a citizen within the meaning of the diversity statute. The author of the opinion in Farnsworth indicates that he would have followed the decision

in State Highway Comm'n of Wyoming v. Utah Construction Co., supra, if the Louisiana court had not already decided that the commission was an entity separate and distinct from the state. An analysis of Gerr v. Emrick, 283 F.2d 293 (3rd Cir., 1960), would add nothing to my discussion and analysis of the power of the Pennsylvania Turnpike Authority in Hunkin-Conkey Construction Co., supra. The Pennsylvania legislation creating the turnpike authority bears little resemblance to the Oregon legislation creating the highway commission. The substance of the decision in Gerr is that the state court decided that the Turnpike Commssion was an entity separate and distinct from the state and was, therefore, a citizen of the state for the purposes of diversity of citizenship. The statutory powers of the commission have already been discussed in Hunkin-Conkey Construction Co., supra.

Aside from Farnsworth, all of the authorities concerned with a state highway commission, where the point has been directly presented, hold that such a commission with powers and duties comparable to those of the defendant is an agency or branch of the state, and is not a citizen within the meaning of the diversity statute. For example, State Highway Comm'n of Wyoming v. Utah Construction Co., supra; State Highway Comm'n in Arkansas v. Kansas City Bridge Co., 81 F.2d 689 (8th Cir., 1936); Simmons v. South Carolina State Highway Department, 195 F.Supp. 516 (E.D.S.C. 1961); Stamey v. State Highway Comm'n of Kansas, 76 F.Supp. 946 (D.Kan., 1948); and Dunnuck v. Kansas State Highway Comm'n, 21 F.Supp. 882 (D.Kan., 1937). In the Simmons and Stamey cases jurisdiction was based on the alleged presence of a federal question and the powers and duties of the commissions were not disclosed. The same can be said of the Dunnuck case. However, the core of the decision in each of those cases was that the highway commission was the means by which the state

performed one of its most important governmental functions, i. e., the construction and maintenance of a state system of highways. In each of these cases, the court held that the Eleventh Amendment barred an action against the highway commission, as an agency of the state.

The most learned discussion of the problem I have found is in Weyerhaeuser Co. v. State Roads Comm'n of Maryland, 187 F.Supp. 766 (D.Md., 1960), where Judge Thomsen undertook to analyze all of the decisions previously made by federal courts on the particular problem, and recognized the existing confusion in the authorities in failing to distinguish between jurisdiction under the diversity statute and a claim of immunity under the Eleventh Amendment. He emphasized the fact that in some instances the states created new and separate state agencies to construct and operate special projects, such as turnpikes and bridges, while in other instances new powers and duties have been lodged in existing agencies. In his study of the decisions, he found that where a new separate agency had been created, the decisions were not uniform as to whether the agency was a citizen under the diversity statute; where the corporation had been created to operate a specific project, it was generally held to be a citizen within the meaning of the statute and where the state had simply granted additional powers and duties to an existing agency, such as a highway commission, the agency did not gain the status of independent citizenship. It was there held that the court did not have diversity jurisdiction. In league with the authorities holding that a commission or agency of a state having similar, if not identical, powers and duties of the defendant, commission, is not a citizen, is Fowler v. California Toll-Bridge Authority, 128 F.2d 549 (9th Cir., 1942). There, the bridge authority bonds were payable solely from the tolls of the bridge and were paid into the State Treasury and credited to a special fund. The Court of Appeals dis-

tinguished this case from the Pennsylvania Turnpike Authority cases on the premise that the latter had power to take title to property and had other powers not existent in the California agency. The more recent Ninth Circuit case of Lowe v. Manhattan Beach School District of Los Angeles County, 222 F.2d 258 (9th Cir., 1955) adds to the prestige of the Fowler case, by holding that a school district is not a citizen within the diversity statute and is part of the state government.

Finally, I turn to a review of the Oregon cases which may be of assistance in finding a solution.

Although plaintiff cites and relies on Tomasek v. Oregon State Highway Comm'n, 196 Or. 120, 248 P.2d 703 (1952), I can find nothing in that decision which is in any way helpful to plaintiff. True enough, the court held that the immunity created by the constitution of the state of Oregon did not bar that particular action. The waiver, however, was by reason of the peculiar provisions of the state constitution as they applied to that particular action. There, of course, the court was not speaking of immunity under the Eleventh Amendment. For that matter, it would appear that the decision favors the viewpoint of defendants, rather than that of plaintiff. It is there emphasized that no valid distinction can be drawn between state highway departments and other political subdivisions of the state and that they all derive their immunity from the same source, i. e., the state, and being agencies of the state they are, in effect, the state itself. It is clear that the Oregon court permitted the action to proceed against the Highway Commission, not on the theory that the Commission was an entity separate, distinct and apart from the state, but on the theory that the Highway Commission was an integral part of the state and that the constitutional provision which impliedly waived immunity on the part of the state, would also be applicable to the Commission.

Morrison v. State Highway Comm'n, 225 Or. 178, 357 P.2d 389, 85 A.L.R.2d 203 (1960), cited by defendants, is of little importance. It merely demonstrates the common practice of instituting an action against the *state of Oregon,* through its State Highway Commission.

The theory that the Highway Commission and its members are clothed with the immunity of the state of Oregon was advanced in Lucas v. Banfield, 180 Or. 437, 177 P.2d 244 (1947). The lower court dismissed the action against the state of Oregon, by and through its Highway Commission, consisting of the named members, on the ground that the state of Oregon could not be sued without its consent. The language of the Oregon Supreme Court clearly recognizes that a suit against the Highway Commission, and its members, is to be viewed as a suit against the state.[23]

Persuasive in a study of the status of the commission is United Contracting Co. v. Duby, 134 Or. 1, 292 P. 309 (1930), where the plaintiffs insisted that the sovereign's immunity was not available to an agency of the state in a suit against the agency predicated upon its failure to perform a duty exacted by a public statute or by a contract executed by the state and the plaintiff. The court held that the absence of the state's name from the named defendants was not conclusive evidence that immunity was unavailable. (State Highway Comm'n v. Utah Construction Co., supra, is cited with approval in Duby, at page 21 and page 25 of 134 Or., 292 P. 309). In speaking of the Highway Commission contract, the court stated that it was the property of the state and that the state was vitally concerned with its interpretation and the per-

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[23] 180 Or. 441, 177 P.2d 245.

> "It is clear that a declaratory judgment proceeding must be dismissed when relief is sought against the State and when it has not consented to be sued."

formance of its obligations. It was there emphasized that the funds out of which the plaintiff sought payment belonged to the state and were in the possession of its treasurer. On the point before me, Duby held that the judgment would necessarily be collected from the state treasury; that the state was a necessary party defendant and that if the state was actually before it in the personage of the highway commission, it was evident that the suit could not be maintained because of the immunity claimed on behalf of the state.

The Highway Commission is a state board of *special and limited powers.* State ex rel. Hagquist v. United States F. & G. Co., 125 Or. 13, 265 P. 775 (1928). Other Oregon cases, such as Butterfield v. State Industrial Accident Comm'n, 111 Or. 149, 223 P. 941, 226 P. 216 (1924); Mohler v. Fish Comm'n, 129 Or. 302, 276 P. 691 (1929) and Pacific Fruit & Produce Co. v. Oregon Liquor Control Comm'n, 41 F.Supp. 175 (D.Or., 1941) touch on the powers and operations of state agencies, other than the Highway Commission. Not to be minimized, however, is the analysis of the subject by Judge Fee, in Pacific Fruit & Produce Co. v. Oregon Liquor Control Comm'n, supra. Judge Fee cites United Contracting Co. v. Duby, supra, in support of his conclusion that the Liquor Control Commission should be differentiated from other agencies, giving as an example the power and control of the State Industrial Accident Commission over its funds, as distinguished from *the limited power of the State Highway Commission over the funds deposited in the State Treasury.* From a thorough study of all the authorties on the subject, I can arrive at no conclusion other than the Oregon State Highway Commission is nothing more than an arm of the state, performing an essential governmental function, rather than an entity, separate and apart from the state, which might be viewed as a citizen within the meaning of the diversity statute.

I(a). As an alternative, the plaintiff argues that by the legislation authorizing the construction of interstate bridges, the Oregon legislature intended to create an autonomous, separate entity or corporation in the nature of an interstate bridge authority, similar to those entities created by other states and known as Turnpike Authorities. This contention is completely unsound. The title to the Act[24] authorizing the Oregon State Highway Commission to construct, operate and maintain a bridge or bridges over the Columbia river to the state of Washington demonstrates, beyond argument, that the state legislature intended the Highway Commission, as then constituted, to proceed with the construction of such bridges and finance the same all in the *name of the state of Oregon.* The legislation authorized the Commission, in the name of the state, to enter into contracts for the construction, purchase, maintenance, operation, repair, reconstruction and improvement of an interstate bridge, such as the one here in question, and to pay the cost of such out of state highway funds or *any other available*

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[24] Laws of Oregon, 1941, Chapter 202, now ORS 381.005 et seq.

"AN ACT

"To authorize and empower the Oregon state highway commission *in the name of the state of Oregon* to construct, reconstruct, purchase, rent, lease or otherwise acquire, improve, operate and maintain a bridge or bridges over the Columbia river to the state of Washington, and to enter into all necessary contracts or agreements therefor with the United States or any of its agencies, the state of Washington or any of its political subdivisions, or any of its agents, any of the political subdivisions of the state of Oregon, and any person, individual, association, corporation, domestic or foreign; to establish free or toll bridges, to pledge the same and the revenues thereof for financial loans, providing for acceptance of donations or gifts of land, money or other valuable things, and providing for the exercise of the power of eminent domain."

funds with the proviso that in the event the bridge operated as a toll bridge, the share of toll revenues accruing to the *state of Oregon* should be applied by the Highway Commission to reimburse the highway funds for expenditures made in connection with the bridge. A further provision required that all contracts be made in the name of the state of Oregon.[25] Each contract with the Government of the United States, or any of its agencies, or with the state of Washington, was required to be made in the name of the state of Oregon.[26] The main thrust of the plaintiff's argument is that ORS 381.025 provides that the construction, purchase, or acquisition of an interstate bridge may be financed in whole, or in part, by loans obtained from the United States Government, or any of its agencies, or from any other source and that as security for the payment of such loans, the revenue of the bridge, over and above the cost of maintenance and operation, might be hypothecated or pledged, *but that no such hypothecation or pledge of revenue should constitute a general obligation of the state.* Plaintiff relies on cases such as Kansas Turnpike Authority v. Abramson, supra. The distinction to be recognized is that under the Oregon legislation, the bridges might be financed through a pledge of the revenues or through general obligation bonds of the state, while the turnpike authorities were authorized to issue bonds solely on the strength of the toll revenues. Additionally, in practically all cases, the turnpike authorities were autonomous entities entirely separate and apart from the state, empowered to make contracts and to proceed in their own names rather than in the name of the state. It is my belief that the 1941 legislation did not change the nature or character of the Oregon State Highway Commission. It remains an agency of the state government and is not a citizen with-

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[25] ORS 381.055 and ORS 381.090.

[26] ORS 381.010.

in the meaning of the diversity statute. An action against the State Highway Commission, its members and officers, amounts to nothing more than an action against the state of Oregon; Morrison v. State Highway Comm'n, supra; Lucas v. Banfield, supra; State Highway Comm'n of Wyoming v. Utah Construction Co., supra; State Highway Comm'n in Arkansas v. Kansas City Bridge Co., supra. An action, such as this, where the nominal defendants are individual state officers, where the relief sought amounts to a construction or enforcement of a contract with the state, is in effect a suit against the state. Of course, the individual defendants cannot be held liable for a breach of the state's contract, since they are not parties to the instrument. In Re Ayers, 123 U.S. 443, 8 S.Ct. 164, 31 L.Ed. 216 (1887); Schrader v. Veatch, 216 Or. 105, 337 P.2d 814 (1959). In other words, the state of Oregon is the real party in interest. Such being the case, the argument on whether the State Highway Commission can be sued in its own name is of no significance. Any judgment obtained against it would, in fact, and in law, be a judgment against the state of Oregon.

SECTION 1331 JURISDICTION

As an alternative, plaintiff suggests federal jurisdiction on a theory that the allegations of the amended complaint require an interpretation of the Constitution and laws of the United States.[27] These theories are outlined in brief under defendants' points (1), (2) and (3), previously mentioned. The plaintiff fails to recognize that the existence of a controversy which arises under federal law does not, in and of itself, divest a state of its immunity under the Eleventh Amendment. This principle is established and clearly stated in Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1899) and Ex parte New York, 256 U.S. 490, 41 S.Ct. 588, 65 L.Ed. 1057 (1921). Otherwise stated, it is a fundamental rule that the judicial power granted by the Constitution does not

[27] 28 U.S.C. § 1331.

embrace the authority to entertain a suit brought against a state, without its consent. Duhne v. State of New Jersey, 251 U.S. 311, 40 S.Ct. 154, 64 L.Ed. 280 (1920); Smith v. Reeves, 178 U.S. 436, 20 S.Ct. 919, 44 L.Ed. 1140 (1900). The recent case of Parden v. Terminal Ry., 377 U.S. 184, 84 S.Ct. 1207 (1964), recognizes this rule, but avoids its effect by holding that the state of Alabama had, under the facts in that case, waived its immunity under the Eleventh Amendment. It is on this theory of waiver that plaintiff makes its final stand in defense of the jurisdiction of this court.

WAIVER

Relying on Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959), plaintiff urges that Oregon waived its immunity under the Eleventh Amendment when it enterd into the bridge construction compact with the state of Washington. Without doubt, Oregon took advantage of the implied Congressional approval which is inherent in the General Bridge Act, 33 U.S.C. § 525 (1946). The Petty case involved federal legislation commonly known as the Jones Act. There, the United States Supreme Court held that Missouri and Tennessee had waived their immunity by acting under an interstate compact which had been presented to Congress and expressly approved by it. The Bridge Commission in the Petty case was created by legislation enacted by the state of Missouri and the state of Tennessee, acting pursuant to the compact clause of the Constitution. A compact was prepared by the two states and submitted to Congress. The compact provided that the Commission should have power to build a bridge and operate ferries across the Mississippi at specified points and that it should have power to contract and to "sue and be sued" in its own name. Congress granted its consent to the compact and attached a significant

provisio with reference to jurisdiction.[28] The court held that the proviso, when read in the light of the "sue and be sued clause" of the compact, reserved jurisdiction in the federal courts to act in any matter arising under the compact and that the states, by approving the compact, thus waived immunity under the Eleventh Amendment. Here, there is no express Congressional approval of the compact, nor does it contain a "sue or be sued clause". Obviously, we are not here concerned with a Congressional proviso on jurisdiction. The decision in Petty is sound, but it does not serve as authority in support of plaintiff's contention.

Upon the principles stated in Parden v. Terminal Ry., supra, decided since this case was argued and the original briefs submitted, plaintiff argues that Oregon waived its immunity under the Eleventh Amendment by engaging in the construction of a bridge to be operated in interstate commerce. There is language in the opinion which may lend support to plaintiff's contention.[29] Be that as it may, I remain of the belief that the decision, as all others, must be read in the light of the facts involved. There, the state of Alabama purchased and commenced operating a railroad some twenty years after the enactment of the Federal Employers' Liability Act. The railroad was engaged in interstate commerce. Only two questions were presented, neither of which is involved in the solution of the problem

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[28] "[N]othing herein contained shall be construed to affect, impair, or diminish any right, power, or jurisdiction of * * * any court * * * of the United States * * *." 359 U.S. at 281, 79 S. Ct. at 789.

[29] "A State's immunity from suit by an individual without its consent has been fully recognized by the Eleventh Amendment and by subsequent decisions of this Court. But when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation." 377 U.S., at 196, 84 S. Ct., at 1215.

before me.[30] The court went on to say that in making FELA applicable to "every" common carrier, the Congress necessarily included a common carrier owned and operated by a state. In the pertinent part of its opinion, the court stated that Alabama had waivd its immunity when it commenced the operation of the railroad some years after the enactment of FELA.[31] That the Court did not intend to weaken, in any way, the immunity granted to a state by the Eleventh Amendment, is emphasized by the language of the opinion as set forth in the footnote.[32]

Although the trend may see to be in the opposite direction, I should pay heed to the recurring admonishment of the courts to keep the federal system within its own sphere of delegated authority and pay full homage to the sancity of the constitutional guarantees in favor of the respective states. From childhood we are taught the value of the virtue of restraint. This virtue is as wholesome when employed by the courts, as it is when exercised by individuals.

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[30] "Here, for the first time in this Court, a State's claim of immunity against suit by an individual meets a suit brought upon a cause of action *expressly created by Congress*. Two questions are thus presented: (1) Did Congress in enacting the FELA intend to subject a State to a suit in these circumstances? (2) Did it have the power to do so, as against the State's claim of immunity?" 377 U.S., at 187, 84 S.Ct., at 1210. (Emphasis supplied).

[31] "Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act." 377 U.S., at 192, 84 S.Ct., at 1213.

[32] "Recognition of the congressional power to render a State suable under the FELA does not mean that the immunity doctrine, as embodied in the Eleventh Amendment with respect to citizens of other States and as extended to the State's own citizen by the Hans case, is here being overriden. *It remains the law that a State may not be sued by an individual without its consent.*" 377 U.S., at 192, 84 S.Ct., at 1213. (Emphasis supplied).

The fact that the state of Oregon, by signing the agreement with the United States, will receive federal funds in aid of the construction of the bridge and that the whole project is subject to the provisions of Title 23 U.S.C. does not, in my opinion, constitute a waiver of the state's immunity under the Eleventh Amendment.

The time tested rule that a waiver of sovereign immunity will be found only where stated in the most express language, or where presented by such overwhelming implication from the text so as to leave no room for any other reasonable construction, as taught in Murray v. Wilson Distilling Co., 213 U.S. 151, 171, 29 S.Ct. 458, 53 L.Ed. 742 (1909), and Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 468-470, 65 S.Ct. 347, 89 L.Ed. 389 (1945), is partcularly applicable to the facts in this case. Furthermore, the heavy burden on the plaintiff to show an "intentional relinquishment or abandonment of a known right or privilege," the doctrine stated in Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938) and Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), has not been met. Under the circumstances of this case, waiver is a federal question.

Also, without merit, is plaintiff's contention that the state of Oregon consented to be sued by reason of the provisions of ORS 30.320.[33] Manifestly, the statute contem-

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[33] ORS 30.320

"*Actions and suits against governmental units.* A suit or action may be maintained against any county and against the State of Oregon by and through and in the name of the appropriate state agency upon a contract made by the county in its corporate character, or made by such agency and within the scope of its authority, and not otherwise; provided, however, that no suit or action may be maintained against any county or the State of Oregon upon a contract relating to the care and maintenance of an inmate or patient of any county or state institution. An action or suit may be maintained against

plates that the state of Oregon be named as a defendant. Here, the plaintiff has deliberately avoided such a step. No doubt, for fear that the state is immune under the Eleventh Amendment. In any event, I feel that this statute waives only the common law immunity of the sovereign to be sued in its own courts and was never intended to waive the state's immunity under the Eleventh Amendment. The common law immunity is ably discussed by Justice Perry in Schrader v. Veatch, 216 Or. 105, 107, 337 P.2d 814 (1959).

In the absence of jurisdiction, the court has no alternative other than to allow defendants' motion.

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any other public corporation mentioned in ORS 30.310 in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such other public corporation."

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 336 1

DeLONG CORPORATION, a Delaware corporation,
Petitioner,

v.

THE OREGON STATE HIGHWAY COMMISSION, composed of Glenn L. Jackson, Kenneth N. Fridley and David B. Simpson, in their capacity as Oregon State Highway Commissioners, and individually, Forrest Cooper and Ivan D. Merchant,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

DeLONG CORPORATION, a Delaware corporation,
Petitioner,

THE OREGON STATE HIGHWAY COMMISSION, composed of Glenn L. Jackson, Kenneth N. Fridley and David B. Simpson, in their capacity as Oregon State Highway Commissioners, and individually, Forrest Cooper and Ivan D. Merchant,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner's citations to opinions below, statement of jurisdiction, questions presented, statutes involved, and statement of the case, are adequate to present the matters involved in the petition for certiorari.

JURISDICTION ASSERTED UNDER 28 U.S.C. § 1332

Petitioners contend that diversity of citizenship exists for the reason that the respondent Oregon State Highway Commission is a separate entity (Pet. Br. 10-11) and hence there is need for clarification of opinions in *Louisiana Highway Comm'n v. Farnsworth*, 74 F.2d 910 (5 Cir.